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CHENG HU and XIAO LIANG

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DONALD CHEN and STEPHANIE
CHAN,

Plaintiffs,

V.

CHENG HU and XIAO LIANG
and DOES 1 through 10, inclusive.

Defendants.

Case No.: 3:21-cv-05065-SK
San Mateo County Superior Court Case
No. 21-CIV-03001

NOTICE AND MOTION FOR FULL OR PARTIAL SUMMARY JUDGMENT

Date: October 3, 2022
Time: 9:30 a.m.
Ctrm/Dept: Courtroom C, 15th Floor
450 Golden Gate Ave.
San Francisco, CA 94102
Judge: Magistrate Judge Sallie Kim

Complaint filed: June 1, 2021
Action removed to this court: June 30, 2021
Trial date: January 24, 2023

TO: THE CLERK OF THE COURT, THE ABOVE-NAMED PLAINTIFFS, AND
THEIR COUNSEL OF RECORD.

Please take notice that on the above date and time, in the above court, located at 450 Golden Gate Avenue, Courtroom C, San Francisco, California 94102, Defendants Cheng Hu and Xiao Liang (Defendants) move the court for an

1 order of full or partial summary judgment on Plaintiffs' Complaint.

2 **I. RELIEF REQUESTED**

3 Defendants Cheng Hu and Xiao Liang (Defendants) move the court for an
 4 order of full summary judgment on all causes of action asserted against them in
 5 Plaintiffs Donald Chen and Stephanie Chan's ("Plaintiffs") Complaint. In the
 6 alternative, Defendants move for partial summary judgment each and any of the
 7 causes of action for Nuisance and Trespass, the request for injunctive relief and/or
 8 the prayer for punitive damages.

9 The grounds for the motion are that Plaintiff cannot meet one or more
 10 elements essential to the forgoing causes of action and/or requests for relief. This
 11 motion is based upon this Notice and Motion, the Request for Judicial Notice, the
 12 Declaration of P.M. Bessette, submitted herewith; documents moving parties
 13 subsequently may file in support of the motion; evidence and argument that may be
 14 presented at the hearing on this matter; the records and files herein; and any such
 15 other matters the court properly may consider.

16 **II. POINTS AND AUTHORITIES**

17 **A. Allegations In The Pleadings**

18 Plaintiffs' Complaint (Dkt. No. __), was filed June 1, 2021 and alleges that
 19 they are the owners of real property with the address 200 Robinwood Lane,
 20 Hillsborough, CA 94010 ("Plaintiffs' Property"). Defendants owned property
 21 uphill of Plaintiffs' Property with the address 325 Moseley Road, Hillsborough,
 22 CA 94010 ("Defendants' Property").

23 On a non-specified date, a mudslide emanating from Defendants' Property
 24 slid onto Plaintiff's Property, depositing soil and debris thereon. Plaintiffs sought
 25 Defendants' assistance in cleaning up the soil and debris on Plaintiffs' property.
 26 Defendants initially agreed to assist but never did participate in clean-up efforts.
 27 The failure to clean up the soil and debris constitutes a nuisance interfering with
 28 Plaintiffs' use and enjoyment of their property. Plaintiffs allege that Defendants'

1 failure to clean up the soil and debris was intentional and in conscious disregard of
 2 Plaintiffs' rights.

3 Based upon the forgoing facts, Plaintiffs allege causes of action for nuisance
 4 and trespass¹. Plaintiffs seek compensatory and punitive damages and injunctive
 5 relief. With regard to the latter, they apparently seek an order directing Defendants
 6 to clean up the soil and debris on Plaintiff's property.

7 There are no allegations in the Complaint that the mudslide was the result of
 8 negligent, reckless, or intentional conduct or ultrahazardous activity. Plaintiffs'
 9 complaint is over Defendants' failure to clean up the soil and debris on Plaintiffs'
 10 land.

11 In their Answer, Defendants admit that a mudslide occurred on their
 12 property on February 8, 2017 and that there were communications between the
 13 parties regarding their participation in cleanup of the same on Plaintiff's Property.
 14 Defendants deny that they ever agreed to so participate. They admit that they
 15 refused to participate in clean-up efforts on Plaintiffs' Property.

16 **B. Relevant Evidence**

17 The subject mudslide occurred on February 8, 2017, following heavy winter
 18 rains. In response to the slide, the Town of Hillsborough was contacted, and Tim
 19 Anderson of the Building/Engineering/PW Department visited the site on February
 20 9, 2017 and issued a Field Report/Correction Notice to the Plaintiffs. (Declaration
 21 of P.M. Bessette ("Bessette Decl."), **Exhibit A.**) The Field Report advised the
 22 Plaintiffs that their neighbors at 325 Moseley were "having some soil issues" and
 23 requested that if the Plaintiffs observed any "soil or water flowing from the
 24 hillside" to contact the Town "immediately." In the ensuing months, the parties
 25 communicated on proposals to shore-up and beautify the slope. Characterizations
 26 proffered by Plaintiffs to the effect that the communications rose to the level of a
 27 "promise" by Hu and Liang to pay for Plaintiffs' repairs are simply not accurate.

28 ¹ Plaintiffs' negligence claims are barred by the statute of limitations.

1 (Bessette Decl., **Exhibit B.**) In the Spring of 2021, Hu and Liang placed their
 2 home on the market and this lawsuit ensued.

3 Following the removal of this action to the United States District Court,
 4 discovery commenced whereby the parties exchanged written discovery (See
 5 Bessette Decl., **Exhibits C, D, E and F.**) Plaintiffs submitted to depositions and
 6 expert reports were exchanged. Throughout the course of discovery, Plaintiffs did
 7 not produce facts, witnesses, or documents to satisfy the required needs of their
 8 causes of action.

- 9 • ***Written Discovery*** – Defendants served plaintiffs with Interrogatories,
 10 Request for Production of Documents and Requests for Admissions.
 11 Plaintiffs' responses to the Defendants' discovery failed to include
 12 any facts, witnesses or documents in support of a claim that the acts or
 13 inaction of Defendants caused the subject mudslide. (Bessette Decl.,
 14 ¶ 9.) In particular, Plaintiffs' Responses to Interrogatories seeking
 15 information relating to the cause of the subject mudslide repeated the
 16 same factual statement relative to the events of the slide and the
 17 failure to have it cleaned up and only stated that: "The Defendants did
 18 not have a retaining wall that could adequately prevent this flow of
 19 loose soil and debris." (Bessette, Decl., **Exhibits E and F.**)
- 20 • ***Deposition Testimony*** – When asked at deposition about support for
 21 their claims against the Defendants, Plaintiff both denied having any
 22 knowledge of Defendants' conduct being causally related to the
 23 mudslide.

- 24 ○ Donald Chen testified as follows:

25 Q. Sir. In your mind, is there anything that my clients did
 26 that intentionally caused the mudslide?

27 A. No.

28 Q. Do you have an opinion -- or are you aware of any facts
 29 that my clients performed acts that caused the mudslide?

1 A. No.

2 Q. Are you aware of anything that my clients did⁶ not do
3 that caused the accident?

4 A. No.

5 Q. Just to confirm, you're not going to express any²⁰ opinion
6 one way or another as to what caused the mudslide, correct?

7 A. Right.

8 (Bessette, Decl., **Exhibit H**, Pages 42:23-25 - 43:1-7; Page
9 44:19-22)

10
11 ○ Stephanie Chan testified as follows:

12 Q. Do you have any information that there was
13 something that my clients did that caused the mudslide?

14 A. It just happened. I don't know.

15 Q. Okay. Do you have any information that there's something
16 that my clients did not do that caused the mudslide?

17 THE WITNESS: It's no.

18 (Bessette, Decl., Exhibit I, Page 15:9-25 - 16:1-3)

19 • ***Expert Report*** - In response to a request for expert information,
20 Plaintiffs produced the June 30, 2022 geological report of Cotton,
21 Shires and Associates. (Bessette Decl., **Exhibit G**.) The report is
22 notable for a detailed rendition of the facts and its failure to attribute
23 any fault to the Defendants. In the "Preliminary Conclusions and
24 Recommendations" section of the report, it addresses a description of
25 the site and remediation efforts that have taken place since the
26 mudslide, including the installation of an engineered retaining wall,
27 and outlines further efforts that are needed to remediate Plaintiffs'
28 Property. The section does not attribute any fault to the Defendants
for the February 8, 2017 mudslide.

1 C. Legal Authorities and Argument2 1. *Summary Judgment Standard*

3 Summary judgment is proper in any case where there is no genuine issue of
 4 material fact. Fed. R. Civ. P. 56(c). The plain language of Rule 56(c) "mandates"
 5 the entry of summary judgment against a party who fails to make a sufficient
 6 showing of the existence of an essential element of his or her case. *Celotex Corp.*
 7 *v. Catrett*, 477 U.S. 317, 322 (1986). The moving party has the burden of
 8 demonstrating the absence of a genuine issue of material fact for trial. *Anderson v.*
 9 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) "[T]he burden on the moving party
 10 may be discharged by 'showing' - that is, pointing out to the district court - that
 11 there is an absence of evidence to support the nonmoving party's case." *Celotex*,
 12 477 U.S. at 325; See also *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990).
 13 Once the moving party has discharged its burden, the nonmoving party must
 14 respond with admissible evidence of specific facts showing a genuine issue for
 15 trial. Fed. R. Civ. P. 56(c).

16 To defeat a properly supported motion for summary judgment, the opposing
 17 party must present more than a scintilla of evidence to support the complaint.
 18 *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1331 (9th Cir. 1997),
 19 citing *Anderson*. A scintilla of evidence, or evidence that is merely colorable or
 20 not significantly probative, does not present a genuine issue of material fact. *Id.*,
 21 *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587
 22 (1986). The sufficiency of the evidence presented by the nonmoving party must be
 23 evaluated in light of the burden of proof the nonmovant will have at trial.
 24 *Anderson*, at 254. If the evidence presented will not carry the nonmovant's burden
 25 of proof at trial, then summary judgment is appropriate. *Id.*

26 2. *Plaintiffs Cannot Establish a Cause of Action for Nuisance*
 27 California Civil Code Section 3479 provides that:

1 Anything which is injurious to health, including, ... or an obstruction to the
 2 free use of property, so as to interfere with the comfortable enjoyment of life
 3 or property... is a nuisance.

4 Plaintiffs claim they suffered harm because Hu and Liang created a
 5 nuisance. To establish a cause of action for nuisance CACI No. 21 provides that
 Plaintiff must prove all the following elements of nuisance:

- 6 1) Plaintiff owned/occupied the property;
- 7 2) That Defendant's action or failure to act created a condition that was an
 obstruction to the free use of property, so as to interfere with the comfortable
 enjoyment of life or property;
- 8 3) That Defendant's conduct in acting or failing to act was intentional and
 unreasonable, unintentional, but negligent, or reckless - the condition that
 defendant created or permitted to exist was the result of an abnormally
 dangerous activity;
- 9 4) That this condition substantially interfered with Plaintiffs' enjoyment of
 their Property,
- 10 5) That an ordinary person would be reasonably annoyed or disturbed by
 Defendant's conduct,
- 11 6) That Plaintiff did not consent to Defendant's conduct,
- 12 7) That Plaintiff was harmed,
- 13 8) That Defendant's conduct was a substantial factor in causing that harm,
 and
- 14 9) That the seriousness of the harm outweighs the public benefit of
 Defendant's conduct.

15 Private nuisance liability depends on some sort of conduct by the defendant
 16 that either "directly and unreasonably interferes with the plaintiff's property or
 17 creates a condition that does so." (*Lussier v. San Lorenzo Valley Water Dist.*
 18 (1988) 206 Cal.App.3d 92, 100.) Element 2 requires that the defendants have
 19 "acted to create a condition or allowed a condition to exist by failing to act. The act
 20 that causes the interference may be intentional and unreasonable. Or it may be
 21 unintentional but caused by negligent or reckless conduct. Or it may result from an
 22 abnormally dangerous activity for which there is strict liability. However, if the act
 23 is intentional but reasonable, or if it is entirely accidental, there is generally no
 24 liability." (*Lussier*, *supra*, 206 Cal.App.3d at p. 100.)

1 Here, there is no evidence that Hu and Liang's actions or failure to act
2 created the mudslide that obstructed Plaintiffs' use of Plaintiffs' Property.
3 Specifically, there is no evidence that the rainstorm and ensuing landslide were
4 triggered by any action or inaction on the part of the defendants.

5 3. *Plaintiffs Cannot Establish a Cause of Action for Trespass*

6 Plaintiffs allege that debris, pipes and other items belonging to Hu and Liang
7 are now on their property and therefore a trespass has occurred. The debris that
8 was part of a landslide, caused by a heavy rainstorm, did not move to Plaintiffs'
9 property due to any intentional, negligent or reckless conduct of Hu and Liang.

10 Trespass is an unlawful interference with possession of property.' [Citation.]
11 The elements of trespass are: (1) the plaintiff's ownership or control of the
12 property; (2) **the defendant's intentional, reckless, or negligent entry onto the**
13 **property;** (3) lack of permission for the entry or acts in excess of permission; (4)
14 harm; and (5) the defendant's conduct was a substantial factor in causing the
15 harm." (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th
16 245, 261–262 (Victory Consultants).)

17 Here, there is no evidence that the rainstorm and ensuing landslide were
18 triggered by any intentional, reckless or negligent action or inaction on the part of
19 Hu and Liang, therefore there was no trespass.

20
21 Dated: August 9, 2022

DEMLER, ARMSTRONG & ROWLAND, LLP

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23
24 By: _____
25 P.M. Bessette
26 Attorneys for Defendants
27 CHENG HU and XIAO LIANG
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